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IN THE

Supreme Court of The United States

October Term, 1961

No. 352

PONCA WHOLESALE MERCANTILE COMPANY,
a corporation,

Appellant,

vs.

ROCKY MOUNTAIN WHOLESALE COMPANY, INC.,
a corporation,

Appellee.

On Appeal from the Supreme Court
of the State of New Mexico

BRIEF OPPOSING MOTION TO DISMISS AND OR AFFIRM

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Appellant's brief opposing Appellee's "Motion To Dismiss And Or Affirm" will be confined to those matters raised in Appellee's motion and not heretofore answered in Appellant's Jurisdictional Statement, or to new matters advanced in Appellee's motion.

STATEMENT

Appellee's Statement, page 3, quotes from the New Mexico Cigarette and Tobacco Tax Act to refute Appellant's Statement, page 1, Jurisdictional Statement. The Cigarette and Tobacco Tax Act is not the act here under question. The act being considered on this appeal is the New Mexico Cigarette Fair Trade Practices Act, New Mexico Laws of 1949, Chapter 175; 49-3-1 to 49-3-13, inclusive, N.M.S.A. 1953.

ARGUMENT

The cases cited by Appellee in support of the proposition that a state may prohibit sales below cost[1] are not authorities opposing Appellant's position. The issue here before the Court is not whether a state may prohibit sales below cost, but whether in so doing it must enact laws which are not unreasonable, arbitrary, capricious or discriminatory.

[1] SAFEWAY STORES, INC. vs. OKLAHOMA RETAIL GROCERS ASSOCIATION, INC. and LOUIE J. SPEED, INC., 360 U.S. 334; 3 L.Ed. 2d 1280; 79 S.Ct. 1196; MAYO, COMMISSIONER OF AGRICULTURE OF FLORIDA, et al. vs. LAKELAND HIGHLANDS CANNING CO., et al., 309 U.S. 310, 318; 84 L.Ed. 774; 60 S.Ct. 517.

Again, at pages 6 and 7, Appellee's motion, the cases cited therein[2] to refute the point for which Appellant cited cases in footnote 3, page 9, Jurisdictional Statement, are not opposed or contrary to Appellant's position. The point is that the right to establish a price at which property may be sold is a property right protected by said constitutional amendment, not that such property right shall under all circumstances be free from regulation or control, but that regulation shall not be unreasonable, arbitrary or capricious.

NEBBIA v. PEOPLE OF THE STATE OF NEW YORK (1934), 291 U.S. 502, 525; 54 S.Ct. 505, 510; 78 L.Ed. 940.

"The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts."

[2] OLSEN v. NEBRASKA, 313 U.S. 236; 85 L.Ed. 1305; 61 S.Ct. 862; LINCOLN FEDERAL LABOR UNION vs. NORTHWESTERN IRON AND METAL CO., 335 U.S. 525; 93 L.Ed. 212; 69 S.Ct. 251.

As to other matters raised in Appellee's motion, such are considered covered or answered in Appellant's Jurisdictional Statement. It is respectfully submitted that the Jurisdictional Statement clearly shows the substantial nature of the questions presented, and because of the unreasonable, arbitrary and discriminatory nature of the New Mexico Cigarette Fair Trade Practices Act, the same should not be permitted to stand as opposed to the protection assured under the Fourteenth Amendment to the Constitution of the United States.

It is not the position of the Appellant that where the legislation is reasonable and not arbitrary, the state may under no circumstances regulate business or property rights of an individual or firm. It is further recognized that the constitutional guaranty does not require that the business itself be a public business, but may regulate any business or property right where the public interest or welfare requires. It is respectfully submitted, however, that such regulations must be reasonable and not arbitrary or discriminatory, as the New Mexico Cigarette Fair Trade Practices Act clearly is in respect to the particular point raised by this appeal.

Respectfully submitted,

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PROOF OF SERVICE

I, JAMES T. PAULANTIS, one of the attorneys for Ponca Wholesale Mercantile Company, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 4th day of October, 1961, I served a copy of the foregoing Brief Opposing Motion To Dismiss And Or Affirm on Rocky Mountain Wholesale Company, Inc., a corporation, appellee herein, by delivering the same to Louis C. Lujan, in person, in his office, 1004 Simms Building, Albuquerque, New Mexico, who is attorney and counsel of record for said Rocky Mountain Wholesale Company, Inc.